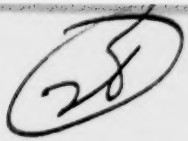

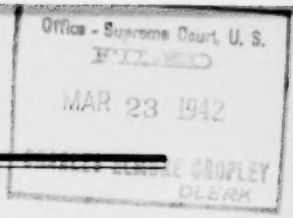

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 987.

FEDERAL POWER COMMISSION,
Petitioner,

v.

SAFE HARBOR WATER POWER CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

GEORGE T. HAMBRIGHT,
CHARLES MARKELL,
E. M. STURTEVANT,
Counsel for Respondent.

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OPINION BELOW.

The opinion of the lower Court [R., Vol. I, 668-679] is reported as *Safe Harbor Water Power Corporation v. Federal Power Commission*, 124 F. 2d 800.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act [U. S. Code, Title 16, §825 l] and Section 240(a) of the Judicial Code, as amended [U. S. Code, Title 28, §347(a)].

QUESTION PRESENTED.

The question now presented is:

Whether Section 20 of the Federal Power Act confers upon the Federal Power Commission (hereinafter called the Commission) jurisdiction to regulate a licensee's rates when [1] each of "the States directly concerned" *has* "provided a commission * * * to enforce the requirements of this section within such State" and [2] "such States are" *not* "unable to agree through their properly constituted authorities * * * on the rates".

STATUTES INVOLVED.

The provisions of Section 20, the closely related Section 19 and the (in the instant case) *unrelated* Section 201, of the Federal Power Act, are set forth in Appendix A [*infra*, 21].

STATEMENT.

Safe Harbor Water Power Corporation, a Pennsylvania corporation, (hereinafter called Safe Harbor), obtained from the Commission, in 1930, a 50-year license to construct and operate a hydroelectric plant on the Susquehanna, near Lancaster, in Pennsylvania. The plant is designed ultimately for twelve units; the "initial development" consisted of six. Construction was begun in 1930, commercial operation of the first four

units in 1932. By 1935 the six had been installed. A seventh has been installed (1939-1940) at the request of the Pennsylvania Railroad [R., Vol. I, 22-23, 268, 287-288, 1-2].

Consolidated Gas Electric Light and Power Company and Pennsylvania Water & Power Company (hereinafter called the Maryland Company and the Pennsylvania Company) own respectively two-thirds and one-third of the capital stock of Safe Harbor; each owns half of the voting stock. In June, 1931, Safe Harbor issued $21,000,000 of first mortgage bonds, due in 1979, guaranteed as to principal and interest by the Maryland Company; the Maryland Company is indemnified by the Pennsylvania Company to the extent of one-third of this guaranty. These bonds were sold, through bankers, to the public. [R., Vol. I, 281].

Under a contract dated June 1, 1931, expiring in 1980, Safe Harbor sells its output, two-thirds to the Maryland Company, delivered in Maryland, one-third to the Pennsylvania Company, delivered in Pennsylvania [R., Vol. II, 70]. This contract was filed with the Commission and with the Maryland Public Service Commission; the Pennsylvania Commission was given detailed information. [R., Vol. I, 326-327]. In effect, through this contract interest and sinking fund payments on Safe Harbor's bonds are guaranteed by the Maryland Company and the Pennsylvania Company. Under the contract annual payments for power were, for the years 1933 to 1937 (the development period) specified lump sums, and for 1938 and thereafter the amount required to yield Safe Harbor

> "a net income of seven per cent., after all reasonable operating expenses, * * * on its accumulated

> actual investment * * *, without regard to the amount of power actually furnished." [R. Vol. II, 64-65].

Though the development period payments yielded *less* than a fair return, Safe Harbor's output was disposed of more promptly and economically through this contract than would otherwise have been possible. In its opinion the Commission says:

> "Safe Harbor Corporation has shown skill and high efficiency in the development and management of its project. During the development period of 1932 to 1939, the increasing capacity of the project was coordinated economically with the existing regional power system." [R., Vol. I, 6, 34].

The Pennsylvania Company sells to the Maryland Company all power (including that purchased from Safe Harbor) not sold to Pennsylvania customers. Pennsylvania customers include the Pennsylvania Railroad and corporations which supply the public at Lancaster, York and Coatesville. The power sold to these Pennsylvania customers does not "enter into interstate commerce". The local companies' rates for power sold in Pennsylvania are subject to regulation by the Pennsylvania commission. The Maryland Company's rates have been regulated by the Maryland commission for over thirty years.

The Instant Proceeding.

On November 9, 1937—before the full contract rate had become effective [*supra*, 3]—the Commission instituted an investigation to determine (*a*) whether the 1931 contract "violates any of the provisions of the Federal Power Act, or any rule, regulation or order of the Commission thereunder" and (*b*) whether any of

Safe Harbor's rates under the contract, "or any rules, regulations and practices" pertaining to such charges "(1) make or grant any undue preference or advantage to any person, or subject any person to any prejudice or disadvantage, or (2) constitute any unreasonable difference in rates, charges, service, or facilities, either as between localities or as between classes of service, or (3) are unjust, unreasonable, or unduly discriminatory." [R., Vol. I, 48-50]. On July 14, 1939 the Commission ordered a hearing to decide (*a*) whether the contract "violates any of the provisions of *Parts I and III**" of the Act [*not* Part II, which includes Section 201] or any rule, regulation or order thereunder, (*b*) whether any of Safe Harbor's rates "are unjust, unreasonable or unduly discriminatory" and (c) determine, and fix, the just and reasonable rates to be made effective [R., Vol. I, 50-51].

At the hearing (before an Examiner), in response to a request by Safe Harbor for a statement of the issues, the Commission's General Counsel made a statement narrowing the issues to the question whether Safe Harbor under the contract "is receiving more than a fair return upon the allowable rate base" *under Part I of the Act*. [R., Vol. I, 54-58]. Later the issues were further narrowed by agreement between counsel. [R., Vol. I, 261-262]. At the hearing the Commission questioned *only* the *amount* of Safe Harbor's rates under the contract (including both the amount of the *base* and the amount of the *percentage* by which the rates are computed) and *not* the method of computation, as a specified

* In this brief all italics are supplied, unless the contrary is stated.

percentage of a specified base instead of demand and energy charges for the amount of power and energy furnished.

In short, the instant case presents (1) no question as to (*a*) the *Shreveport* doctrine [*Houston E. & W. T. Ry. Co. v. United States*, 234 U. S. 342. Cf. *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352-353] or (*b*) any other kind of discrimination, and (2) as the Circuit Court of Appeals rightly holds [R., Vol. I, 679; 124 F. 2d 809], *no question as to Section 201 or Part II of the Federal Power Act.*

At the conclusion of the hearings Safe Harbor moved to dismiss the proceedings for the reason (1) that the Pennsylvania and Maryland commissions have full authority to enforce the requirements of Section 20 within their respective states, and the Commission has no jurisdiction over Safe Harbor under Section 20, and (2) that there is no substantial evidence that any rates under the 1931 contract are unjust, unreasonable or unduly discriminatory [R., Vol. I, 660-661].

On June 17, 1940 the Commission issued its opinion and its order, dated June 11, 1940, requiring Safe Harbor to "revise its filed rate schedule" [*i. e.*, the 1931 contract, which had been filed as a rate schedule] "so as to provide for a 6% return on the average net capital investment in its licensed project plus working capital, as more fully set forth in the * * * opinion" [R., Vol. I, 9, 41].

Application for a rehearing was filed on July 16, 1940 and denied on July 23, 1940 [R., Vol. I, 11]. On September 10, 1940 Safe Harbor filed a petition for review in the Circuit Court of Appeals for the Third Circuit [R., Vol. I, 1-21, 669-670; 124 F. 2d 803].

In the Circuit Court of Appeals the case was heard both (1) on the question of the Commission's jurisdiction and (2) on the merits of the Commission's order. Safe Harbor maintained (1) that under Section 20 the Commission has no jurisdiction to regulate Safe Harbor's rates, but such jurisdiction is conferred upon the Pennsylvania and Maryland commissions and (2) that the Commission's order is confiscatory, arbitrary and unsupported by substantial evidence (*a*) in respect of the maximum return allowed on the *statutory* base, *cost or value whichever is lower*, (*b*) in disregarding the provisions of Section 20—and Sections 14 and 3(13)—in the determination of Safe Harbor's "net investment" and (*c*) in other respects.

The Circuit Court of Appeals [1] set aside the Commission's order as beyond its jurisdiction, [2] without passing upon the merits [R., Vol. I, 679; 124 F. 2d 809]. At this stage of the case, therefore, Safe Harbor will not discuss the merits of the Commission's order.

ARGUMENT.

Section 20 provides: "That when said power ['developed' by a licensee] or any part thereof shall enter into interstate * * * commerce the rates charged * * * by any such licensee, or by any subsidiary * * * controlled * * * by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates * * * are hereby prohibited and declared to be unlawful; and [1] whenever any of the States directly concerned has not provided a commission * * *

to enforce the requirements of this section within such State * * *, or [2] such States are unable to agree through their properly constituted authorities * * * on the services to be rendered or on the rates * * * therefor, * * * jurisdiction is hereby conferred upon the commission * * * to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates * * * therefor as constitute interstate * * * commerce * * *." [Bracketed numbers supplied].

The facts are: [1] Each of "the States directly concerned", viz., Pennsylvania and Maryland, *has* "provided a commission * * * to enforce the requirements of this section within such State"; [2] "such States are" *not* "unable to agree through their properly constituted authorities * * * on the rates". Consequently, "jurisdiction is" *not* "conferred upon the Commission * * * to enforce the provisions of this section". The lower Court so held [R., Vol. I, 672-679; 124 F. 2d 805-808]. This decision was clearly correct.

A.

The Commission says that in the construction of a statute effect must be given to the intent of Congress, even when contrary to the plain meaning of the words.[1] Such an intent, however, is not lightly to be inferred.[2] "While one may not end with the words of a disputed statute, one certain begins there".[3]

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[1] *United States v. American Trucking Associations*, 310 U. S. 534, 542-544; *United States v. Dickerson*, 310 U. S. 554, 561-562; *United States v. N. E. Rosenblum Truck Lines*, — U. S. —, 62 S. Ct. 445, 449.

[2] *United States v. American Trucking Associations*, 310 U. S. 542-544.

[3] *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 350.

The Commission contends that in Section 20 the intent of Congress was (1) to "leave" with the states only the jurisdiction they already possessed in "the silence of Congress" and (2) to confer upon the Commission all other jurisdiction over interstate rates. This was substantially the scope of the Interstate Commerce Act *before* the passage of the Transportation Act of 1920,[4] except that to the extent of the *Shreveport* doctrine state jurisdiction had been narrowed and federal jurisdiction enlarged.[5] This was also substantially the scope of the Shields bill,[6] which passed the Senate on December 14, 1917, and by which licensees' rates were made subject to state regulation, except where the power entered into interstate commerce, in which case the Interstate Commerce Commission was given jurisdiction.[7] The scope of the Shields bill in this respect was radically changed in the first substitute bill reported in the House[8], and was never restored in the course of the legislative proceedings that culminated in the passage of the Federal Water Power Act of 1920.

The alleged intent of Congress in Section 20 never existed; it is an afterthought of the Commission. The words of the statute accurately express the actual intent of Congress, which was quite different from the original Shields bill. In Sections 19 and 20 of the Federal Water Power Act, Congress for the second time within a few months made a new departure from the division line

[4] February 28, 1920, c. 91, 41 Stat. 456.

[5] *Wisconsin Railroad Commission v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 579-589.

[6] S. 1419. R., Vol. I, 674; 124 F. 2d 806.

[7] Senate Report No. 179, 65th Congress, 2d Session, p. 4, December 12, 1917. See also Congressional Record, Volume 56, Part 1, p. 284.

[8] House Report No. 715, 65th Congress, 2nd Session, June 28, 1918.

between state and federal jurisdiction in the silence of Congress. In the Transportation Act of 1920, Congress had materially narrowed state jurisdiction and broadened federal jurisdiction in the predominantly national problem of railroad rate regulation.[9] In Sections 19 and 20 of the Federal Water Power Act of 1920, Congress selected a new criterion in drawing the line between state and federal jurisdiction in the predominantly—and ultimately—local[10] problem of electric rate regulation. Instead of drawing this line between intrastate and interstate commerce, Congress made the same division of jurisdiction with respect to *both* intrastate and interstate commerce. The single criterion is whether or not the states *have provided commissions* to exercise such jurisdiction. When the states have provided commissions, then the state commissions under Section 19 have jurisdiction over intrastate rates, and under Section 20 have jurisdiction when the power has entered into interstate commerce. If the states have not provided commissions (or if, when the power has entered into interstate commerce, states directly concerned are unable to agree through their commissions on the rates), then the Federal Power Commission under Section 19 has jurisdiction, even over intrastate rates, and under Section 20 has jurisdiction when the power has entered into interstate commerce.

In selecting this single criterion Congress obviously departed *in both directions* from the division line in the

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[9] *Wisconsin Railroad Commission v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585.

[10] See Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments", 34 Yale Law Journal 685, 712-715, note 117; Selected Essays on Constitutional Law, Vol. 3, pp. 1606, 1633-1636.

silence of Congress. When a state has *not* provided a commission, the license is made a *contractual* basis for extending federal jurisdiction to *intrastate* rates. When states have provided commissions, state jurisdiction is expanded by removal of restrictions by *permission* of Congress. The power of Congress to regulate commerce by permitting particular matters to be subject to local regulation by the states had been established by this Court before 1920[11], has been reaffirmed since[12] and has been exercised from the beginning of the Government.[13] Matters which may be so regulated include rates[14] and other utility regulation;[15] even in the silence of Congress *some* interstate rates can be regulated by the states.[16]

If there be any difference between "leaving" jurisdiction with the states and "conferring" jurisdiction upon the states, then jurisdiction "to enforce the requirements" of an *Act of Congress* is "conferred" by *permission* of Congress. In conferring jurisdiction upon the Federal Power Commission when the states have *not* "pro-

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[11] *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 325-332, decided January 8, 1917; *In re Rahrer*, 140 U. S. 545.

[12] *Whitfield v. Ohio*, 297 U. S. 431, 439-440; *Whip & Collar Co. v. I. C. R. Co.*, 299 U. S. 334, 349-351; *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 313-314.

[13] Act of August 7, 1789, 1 Stat. 54, §4; *Cooley v. Board of Port Wardens*, 12 How. 299, 317. Acts of 1796, 2 Stat. 545, and 1799, 3 Stat. 126; *Gibbons v. Ogden*, 9 Wheat. 1, 205. Acts of 1803, 2 Stat. 205; *The Brig Wilson*, 1 Brockenbrough, 423, 437, per MARSHALL, C. J. Act of July 3, 1866, c. 162, §5, 14 Stat. 82; R. S. §4280; 46 U. S. C. A. §174.

[14] *Covington etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 209, 223.

[15] *Inter-Island Co. v. Hawaii*, 305 U. S. 306.

[16] *Port Richmond Ferry v. Hudson County*, 234 U. S. 317, 330-331-332; *Wilmington Transp. Co. v. Railroad Commission of California*, 236 U. S. 151, 153-157. Cf. *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, — U. S. —, 62 S. Ct. 384, 387.

vided a commission to enforce the requirements of this section", Congress expressed its intent that when the states *have* provided commissions, the commissions *may* "enforce the requirements of this section".

B.

In 1929 the Commission "approved as a decision of the commission" an opinion of its counsel[17] which (giving no effect to the *words* of Section 20 or the *permission* of Congress) reached the conclusion that the jurisdiction of state commissions *under Section 20* is limited by the decisions applicable *in the silence of Congress.*[18] As the Circuit Court of Appeals says, this opinion of counsel was never "enforced by actual order and for this reason represented theory rather than practice" [R., Vol. I, 679; 124 F. 2d 808].[19] Indeed this opinion was never acted upon at all by the Commission.

Section 20, as enacted in 1920, has never been amended or even reenacted. The Act of 1935 left it unchanged. Apparently it was not discussed in the debates or committee reports on the Act of 1935.[20] For seventeen years

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[17] Federal Power Commission, Ninth Annual Report (1929), pp. 36, 119-131.

[18] *E. g., Public Utilities Commission v. Attleboro Co.*, 273 U. S. 83; *Missouri v. Kansas Gas Co.*, 265 U. S. 298; *Pennsylvania Gas Co. v. Public Service Commission*, 253 U. S. 23.

[19] See also *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352.

[20] Mr. DeVane, Solicitor for the Commission, in the course of his statement before the House Committee said: "The Commission has interpreted this law [Section *19*] as giving its jurisdiction in cases that fall within the principles announced by the Supreme Court in the Attleboro case, referred to by me on yesterday." [Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Congress, 1st Session, p. 510]. On the strength of this remark the Commission says that the 1929 opinion of its counsel was "called to Congressional attention before Section 20 was reenacted [*sic*] in 1935". [Petition, p. 17].

—until the institution of the instant proceedings in 1937 —the Commission never attempted to exercise rate-making jurisdiction under Section 20.

The Commission now sets up this 1929 opinion as an "administrative construction" of Section 20. This is "administrative construction" run riot. Not only was this opinion never acted upon by the Commission; the same Annual Report (1929) that contains this opinion (as an appendix) also contains a discussion of "Regulatory Jurisdiction of the Commission" [Appendix B; *infra*, 25]. In this discussion the opinion of counsel is not mentioned or referred to; the administrative *practice* shown and the view taken of the statute are in accord with the *words* of the statute and the decision of the Circuit Court of Appeals. The notion that the *Attleboro* case affected the construction of Section 20 or presented any new problem is not suggested, but is in effect excluded.

> "* * * Very wisely, Congress by the act subordinated the regulatory powers of the commission to the jurisdiction exercised by the several States. * * * Relative to licensees engaged in interstate public-utility business section 20 of the act authorized the commission to perform regulatory functions only when one of the States concerned has not created proper regulatory authority or when the States are unable to agree between themselves.
>
> "It seems clear, therefore, that Congress thought of the control of electrical utilities as a local problem and that the imposition of a superior authority would be needed only in the event of disputes between States. Doubtless it was recognized that electric power must of necessity be used in the immediate vicinity of its production and that its transportation lacks the complicated interstate relations

affecting large groups of States, as in the case of railroad transportation. Being a local problem it was considered that its control might best be attained by local responsibility and local opinion.

"During the nine years that have passed since the enactment of the law its administration has suggested no need for altering the present scope of its regulatory provisions. Necessarily, the activities of this character have been small under the limited jurisdiction conferred. * * *

* * *

"* * * The only case of an interstate character in which the commission has been called upon to participate concerned the Conowingo plant, where some cooperation was extended to the Maryland and Pennsylvania public-service commissions relative to the control of security issues and rate agreements." [Appendix B; *infra*, 25-26].

The ground for the Commission's jurisdiction in the Conowingo case was failure of the State of Pennsylvania to "provide a commission" to regulate issuance of securities. [Appendix C; *infra*, 26-27. Exhibit No. 32; R., Vol. II, 394, 395, 397].

In short, *the only actual administrative practice* shown is that *for seventeen years the Commission never attempted to exercise the jurisdiction now asserted.*

C.

Mr. Sherbow, People's Counsel[21] to the Maryland Public Service Commission (*not* counsel for the commission) intervened in the instant proceedings before the Commission and filed a brief and made an oral argument, as

[21] Annotated Code of Maryland (Edition of 1939), Art. 23, Sec. 353.

amicus curiae, in the lower Court. Having subsequently become General Counsel for the Maryland commission, he has filed a memorandum in this Court in support of the petition for certiorari.

The Maryland commission has not hitherto taken the limited view of its own jurisdiction now taken by its counsel. In the Conowingo case in 1926, the Maryland commission in its opinion accompanied its *action* by a *contemporaneous construction* of Sections 19 and 20. After quoting Section 19 as establishing control by the Maryland commission over current generated and delivered in Maryland, the commission said:

> "In the event interstate complications should develop in a direction other than the supplying of Maryland consumers with current from the project, Section 20 provides for the settlement of those matters by the regulatory agencies of the states affected. *Only when such state regulatory bodies do not exist,* or the states cannot agree among themselves does the Federal Power Commission step in to regulate them." [Exhibit No. 30; R. Vol. II, 331-349].

Safe Harbor and the Pennsylvania Company each have an office in Maryland, sell and deliver power in Maryland [*supra*, 3, 4], and have designated an agent for service of process under the Maryland foreign corporation law, which in this respect is applicable to corporations doing either intrastate or interstate business in Maryland.[22] The Maryland Company has purchased power from the Pennsylvania Company for more than thirty years and from Safe Harbor for ten years. Throughout this period the Maryland commission has

[22] Annotated Code of Maryland (Edition of 1939), Art. 23, Section 119. *International Harvester Co. v. Kentucky*, 234 U. S. 579.

regulated the Maryland Company's rates, and in so doing has fully investigated and indirectly regulated the wholesale rates paid for power.[23]

D.

The intent of Congress, clearly expressed in the words of Sections 19 and 20, was to insure *unified* regulation—and avoid *duplicate* regulation—of licensees' rates, both intrastate and interstate, by state commissions (when the states provide commissions) or by the Federal Power Commission if the states do not provide commissions or if their commissions disagree. The Commission's assertion of jurisdiction in the instant case would defeat the intent of Congress. Safe Harbor sells only to its two stockholders, the Pennsylvania Company and the Maryland Company, both of which are subject to local regulation. Regulation of Safe Harbor's rates by the Federal Power Commission *can affect no public interest* and *can have no practical effect at all*, except as constituting an *item* in the ultimate *local* regulation of *local* rates to the public. The net result of establishing the jurisdiction asserted by the Commission would be merely to *duplicate complete* regulation, by the Pennsylvania and Maryland commissions, by *partial* regulation by the Federal Power Commission.

E.

Referring to the provisions of Section 20 that make the jurisdiction of the Commission dependent upon the in-

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[23] Cf. *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 151-157; *Western Distributing Co. v. Commission*, 285 U. S. 119, 123-125, 126-127; *Dayton P. & L. Co. v. Commission*, 292 U. S. 290, 295; *Columbus G. & E. Co. v. Commission*, 292 U. S. 398, 400-401, 414-415; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 306-308; *Lone Star Gas Co. v. Texas*, 304 U. S. 224, 236-242.

ability of the states "to agree on the rates", the lower Court says, "Such an agreement would be a compact"; explains that "a compact like an agreement may be deemed to arise out of actions which are quite informal"; and concludes that if Pennsylvania and Maryland, through their respective commissions, "have agreed informally, by cooperative or identical actions", to regulate Safe Harbor's rates, "such would be within the perview of the compact clause and the permission given by Congress by Section 20" [R., Vol. I, 678; 124 F. 2d 808]. The Commission faintly suggests doubt as to whether state commissions, consistently with due process, can "agree on rates" through compacts [Petition, pp. 10-11, note 4]. Whether "agreement on rates" by identical actions would be a "compact" is an academic verbal question. Certainly it would be "within the permission given by Congress by Section 20". Due process does not require that two commissions, in the supposedly rational process of decision upon evidence, must reach different results. When two federal courts are "unable to agree" on a question of law, this Court has jurisdiction; when two state commissions are "unable to agree on rates", the Federal Power Commission has jurisdiction.

F.

In the instant case the Commission's ultimate objective apparently is not Section 20 (enacted in 1920), but Section 201 (enacted in 1935). [Petition, pp. 7, 8, 11-12]. The Commission would resolve ambiguities in Section 201 by distorting the unambiguous *words* and *intent* of Section 20. As the Circuit Court of Appeals says, questions under Part II (including Section 201) "are not properly in this case". [R., Vol. I, 679; 124 F. 2d 809]. The Commission in this case has *not* attempted to exercise

any authority under Section 201 [Petition, p. 8]. At and before the hearing the Commission studiously excluded Part II and limited the issues to Part I [*supra*, 5].

Whether or not any ambiguities in Section 201 can be clarified by Section 20, are questions that may be decided in some case in which they actually arise. There may be no physical difference between electricity generated by licensees and other electricity. There is, however, little legal or verbal similarity between Sections 19 and 20 and Section 201. The basis for regulation of rates of licensees under Part I—but *not* of public utilities under Part II—is *contractual* [*supra*, 11].

Section 201 furnishes no color for distorting the plain meaning of Section 20 so as to enlarge the Commission's jurisdiction and encroach upon the jurisdiction of state commissions. The Federal Water Power Act of 1920 was amended by Title II of the Public Utility Act of 1935[24]; Title II, entitled "Amendments to Federal Water Power Act", includes amendments to various provisions of the Federal Water Power Act (now Part I of the Federal Power Act) and the addition of Parts II (including Section 201) and III of the Federal Power Act.

Concerning the purpose of Title II of the Act of 1935, the report of the House Committee said:

> "*The amendments to the present Federal Water Power Act are all minor.* They have been requested by The Federal Power Commission, largely for the purpose of clarifying the Act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars * * *.
>
> * * *

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[24] August 26, 1935, c. 687, 49 Stat. 797.

> "The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges. Provision is made for joint boards composed of members of State Commissions which may be used for this purpose. The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State Commissions. *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does Title II of this bill.*"[25]

Notwithstanding assurances by the Commission's spokesmen that the bill, as presented by the Commission, did not encroach upon the jurisdiction of state commissions, Congress revised the bill, as so presented, by adding at the end of Section 201(a) the proviso,

> "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

Concerning this revision, the Senate report said:

> "* * * The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the State. * * *"[26]

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[25] House Report No. 1318, 74th Congress 1st Session, pp. 7-8.
[26] Senate Report No. 621, 74th Congress, 1st Session, p. 18.

CONCLUSION.

The decision of the lower Court is clearly correct. There is no conflict of decisions. The decision below gives effect to (1) the plain meaning of the words of the statute, (2) the equally clear intent of Congress and (3) the Commission's own actual practice for seventeen years.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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